

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>93-10771</u>
JOHN A. BUSH, JR.)	
JOELLA S. BUSH)	
)	
Debtors)	
_____)	
UNITED STATES TRUSTEE)	
)	
Movant)	
)	
vs.)	
)	
JOHN A. BUSH, JR.)	<u>ORDER</u>
JOELLA S. BUSH)	
)	
Respondents)	

The United States Trustee ("the Trustee") seeks dismissal of this Chapter 7 proceeding pursuant to 11 U.S.C. § 707(a) or § 707(b).¹ A hearing was held on the Trustee's motion on September

¹ 11 U.S.C. § 707 provides:

- (a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including-
 - (1) unreasonable delay by the debtor that is prejudicial to creditors; [or]
 - (2) nonpayment of any fees [or] and charges required under chapter 123 of title 28 [28 USC § 1911 et seq.]; and
 - (3) failure of the debtor in a voluntary case to file, within 15

2, 1993. Based on the evidence presented at the hearing, a review of the case file, and consideration of applicable authorities, I make the following findings of fact and conclusions of law granting the Trustee's motion under both 11 U.S.C. § 707(a) and § 707(b) with regard to debtor John A. Bush, Jr.² and dismissing him from this case.

Debtors, John A. Bush, Jr. and Joella S. Bush filed a joint petition for relief under Chapter 7 of Title 11 United States Code on May 21, 1993. In 1990 Mr. Bush retired from E-Z-GO Textron and started his own business, Designed Energy Systems, Inc., which consisted of inventing and attempting to market a timing device called the "Wizard of Watts" for use by golf courses in charging their electric golf carts. After failing to successfully market the device, in February 1991 Mr. Bush sold the idea and design to E-Z-GO Textron and returned to work for the company, where he is currently

days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but [and] not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

² At the close of the U. S. Trustee's case in chief, counsel for the debtors moved that I deny the motion to dismiss as it pertained to debtor Joella Bush. Based on lack of evidence then introduced to support the motion to dismiss and lack of objection by the Trustee, I consented to counsel's motion.

employed. Mrs. Bush does not work outside the home.

The debtors' schedule of current income and expenses submitted with their Chapter 7 petition reflects a monthly gross income of \$4,944.00 with monthly take home pay of \$3,346.00. This translates to a gross annual income of \$59,328.00 with an annual take home pay of \$40,152.00. The debtors' schedules list expenses of \$3,375.00 per month.

The debtors' schedules, as amended, reflect a total secured debt of \$88,081.00, resulting from two mortgages on debtor's home, two mortgages on a .8 acre unimproved lot, and a total unsecured debt in the amount of \$74,815.00. Of the unsecured debt, \$52,055.00 resulted from the use of eighteen different credit cards and \$17,820.00 resulted from the use of two different credit lines. Despite these high credit card bills, the debtor testified at the hearing that at the time he filed his petition he was current in his house and both car lease payments.

On the same day that Mr. Bush executed his schedules in this case, he cashed in his Textron stock for \$9,644.05. Neither the stock nor the proceeds were listed as an asset in his schedules. The debtor testified that this money was used to pay attorney fees, to make a \$4,800.00 payment to the IRS and to pay other bills that were due. Mr. Bush also failed to disclose in the schedules his arrangement with Textron whereby he receives a commission on every sale made by Textron of a Wizard of Watts energy system.

Mr. Bush also admitted at the hearing that as well as

being employed by Textron, he is involved in two home businesses, the sale of a golf training manual he wrote and as an agent for Meleluca Home Products. Mr. Bush testified that neither of these businesses were profitable and neither were disclosed in the debtors' schedules. Mr. Bush testified that his Meleluca business had about \$150.00 worth of inventory which was not scheduled.

Contemporaneous with the filing in this case, Mr. Bush renewed a lease arrangement for a monthly payment of \$456.00 on a luxury automobile, a 1990 BMW driven by his wife. Additionally, in February or March 1993, Mr. Bush entered into a lease transaction with Ford Motor Credit for a \$28,000.00 new 1993 Lincoln Town Car with payments of \$564.00 per month. Mr. Bush testified that he leased the Lincoln because he was unable to obtain credit anywhere else, his employment required extensive traveling, and he needed a "fairly decent car" to convey the image of E-Z-GO. However, Mr. Bush admitted that no other salesmen drove a Lincoln Town Car and that the company provided salesmen operating outside of Augusta with either a Ford Crown Victoria, a Ford Explorer or Pick-up Truck. Mr. Bush admitted that a Crown Victoria was priced around \$21,000.00 and that payments on it would be in the \$400.00 range.

Section 707(a) of the Bankruptcy Code provides that the court may dismiss a Chapter 7 case for cause after notice and a hearing. The for cause bases listed in § 707(a)(1)-(3), see supra, are non-exclusive. Implicit in § 707(a) is the requirement that any debtor voluntarily proceeding in a bankruptcy and seeking the

protection of the court and the fresh start contemplated under a Chapter 7 discharge must file the petition in good faith. In re Zick, 931 F.2d 1124 (6th Cir. 1991); In re Sky Group International, Inc., 108 B.R. 86 (Bankr. W.D. Pa. 1989); In re Hartford Run Apartments of Buford, Ltd., 102 B.R. 130 (Bankr. S.D. Ohio 1989). Good faith must be determined on a case-by-case basis considering whether the provisions, purpose or spirit of the bankruptcy laws have been abused. Sky Group International, 108 B.R. at 90. Once the movant has put the debtor's good faith at issue, the debtor has the burden of establishing good faith. In re Frisch, 76 B.R. 801, 804 (Bankr. D. Colo. 1987); In re Hammonds, 139 B.R. 535 (Bankr. D. Colo. 1992).

In this case, the debtor's lack of good faith in filing his petition is indicated by his non-disclosure of assets and business involvements. On the same day that Mr. Bush executed his schedules, he cashed in his Textron stock for \$9,644.05 but failed to list the stock or the money as an asset in his personal property schedules. The debtor also failed to disclose that he had an arrangement with Textron whereby he received a commission on every Wizard of Watts energy system sold by Textron. The debtor failed to disclose in his schedules either the operation or inventory of two home businesses, sale of a golf training manual and his acting as an agent for Meleluca Home Products. The debtor entered into even of filing lease agreements for two luxury automobiles with payments totaling \$1,020.00 per month.

A good faith filing in a Chapter 7 bankruptcy context requires, at a minimum, an effort by the debtor to fully and honestly disclose his business arrangements, his debts and his assets, so that all parties in interest, including the United States Trustee, can properly evaluate the debtor's situation by reference to the submitted schedules and make a determination of whether or not to oppose the debtor's request for discharge. In this case, Mr. Bush's less than full and candid disclosure is a "bad faith" ground for dismissal. See In re Hammonds, 139 B.R. 535, 542 (Bankr. D. Colo. 1992).

In addition, a bad faith filing may be found where the debtor has failed to significantly reduce his or her current lifestyle in order to pay creditors. In re Zick, 931 F.2d 1124, 1128 (6th Cir. 1991). Contemporaneous with the filing of bankruptcy, Mr. Bush renewed a lease for a luxury automobile, a 1990 BMW, with payments of \$456.00 a month to be driven by his wife, who does not work outside the home and has no income. In addition, Mr. Bush immediately before entering bankruptcy leased a brand new \$28,000.00 Lincoln Town Car, another luxury automobile, with payments of \$564.00 per month for his use as a salesman. Mr. Bush admitted, however, that other salesmen drove less expensive automobiles. Mr. Bush's contention that he purchased the Town Car because he was unable to obtain credit elsewhere is unavailing, especially as he was already leasing the 1990 BMW. Moreover, Mr. Bush admitted, upon questioning by the Trustee, that although he had

large credit card debt on the date he filed his petition, he was current in both his mortgage and car payments.

As stated in In re Jones, 114 B.R. 917, 926 (Bankr. N.D. Ohio 1990):

Bankruptcy protection was not intended to assist those who, despite their own misconduct, are attempting to preserve a comfortable standard of living at the expense of their creditors. Good faith and candor are necessary prerequisites to obtaining a fresh start.

I find that Mr. Bush's failure to properly disclose his assets and business involvements and his failure to make any significant reduction in his lifestyle while attempting to discharge his debt to creditors constitutes a bad faith filing warranting dismissal under § 707(a).

For much the same reasons, dismissal is also warranted as to Mr. Bush under 11 U.S.C. § 707(b). Section 707(b) allows a court to dismiss a case filed by an individual debtor with primarily consumer debts if the granting of relief to the debtor would be a substantial abuse of the provisions of Chapter 7. 11 U.S.C. § 707(b) supra. As § 707(b) creates a presumption in favor of granting a discharge under Chapter 7 to the debtor, the Trustee carries the burden of going forward with evidence of substantial abuse. 4 Collier on Bankruptcy para. 707.08 at 707-23 (15th ed. 1993). The court must give the benefit of any doubt to the debtor and dismiss the case only when substantial abuse is clearly present. In re Kelly, 841 F.2d 908, 917 (9th Cir. 1988). In this case, the Trustee has carried his burden of going forward with evidence of

substantial abuse and I find that a dismissal on the grounds of substantial abuse under 707(b) is clearly warranted.

In order to apply § 707(b) the court must first determine that (1) the debtor is an individual, and (2) the debts incurred by the individual are primarily consumer debts. In this case, the debtors, John A. Bush, Jr. and Joella S. Bush are individuals.

A debtor has primarily consumer debts if "more than half-of the dollar amount owed is consumer debt." Kelly, 841 F.2d at 913. Although the debtors list the total business debt as \$116,488.00 and the total consumer debt as \$47,408.00, Resp't Ex. 3, I find that these totals do not accurately reflect the nature of these debts. The major portion of the claimed business-debt comes from mortgages on debtors' home and on two building lots. Debt secured by real property is consumer debt unless the debt was incurred in conjunction with business ventures or other profit seeking activities. Kelly, 841 F.2d at 913; 4 Collier on Bankruptcy para. 707.06 at 707-19 (15th ed. 1993). In their debt analysis, debtors list a \$53,000.00 second home mortgage from Fleet Finance as a business debt. Debtors' Ex. 3. However, the testimony of Mr. Bush revealed that \$38,000.00 of the \$53,000.00 loan was used to pay off a prior second mortgage on his home with the other \$15,000.00 used to pay off an equity line and other business debts. There was no evidence to suggest that this \$38,000.00 home mortgage payoff was in any way business related. Therefore, reclassifying this amount as consumer debt results in debtors having a total of \$78,488.00 in

business debt and a total of 85,408.00 of consumer debt. Moreover, although I am convinced that some of Mr. Bush's debts were related to his business, Design Energy Systems, Inc., I find certain of his testimony as to the business related nature of credit card transactions involving First Bank Card - \$3,950.00, First Union - \$4,147.00, MBNA America - \$10,163.00, and Wachovia - \$6,580.00 to lack credibility. In essence Mr. Bush was forced to use credit cards to maintain his standard of living when his Design Energy Systems, Inc. business failed to generate the necessary income. He lived off his credit cards. This is consumer debt. Additionally, while Mr. Bush used the American Express credit card for work-related expenses with Textron, he was reimbursed for these expenses, \$4,738.00, by his employer and the money was then diverted to some other purpose. Accordingly, I find that the debts incurred by Mr. Bush are primarily consumer debts.

After this initial showing, in determining whether a Chapter 7 filing constitutes a substantial abuse of the bankruptcy process, the court may consider the following factors, among others:

(1) whether the debtor has exhibited bad faith in the filing of his petition and schedules or engaged in "eve of bankruptcy purchases"; and

(2) whether the debtor has suffered some unforeseen calamity, or is simply using Chapter 7 to provide relief from past excesses.

In re Krohn, 886 F.2d 123, 125 (6th Cir. 1989); 4 Collier on Bankruptcy para. 707.07 at 707-23 (15th ed. 1993).

As discussed earlier with regard to § 707(a), Mr. Bush

failed to disclose certain stock proceeds and business involvements in his schedules, including his commission arrangement with Textron. In addition, Mr. Bush engaged in "eve of bankruptcy purchases" by entering into two leases of luxury automobiles. In this case, debtors' bankruptcy was not precipitated by sickness, unemployment or other major calamity, but simply from the debtors' abuse of credit by running up credit card debt far in excess of their ability to repay in order to maintain a standard of living he could no longer afford. Mr. Bush has not made any attempt to reduce the family lifestyle, seeking instead to have creditors, in effect, finance the standard of living he and his wife have maintained throughout the period in which Mr. Bush incurred this debt. Mr. Bush proposes to make no sacrifices whatsoever, no economization. This is clearly demonstrated by his lease of two luxury automobiles on the eve of bankruptcy and the debtors entering bankruptcy while current on their home mortgage and car lease payments, and drowning in unsecured credit card debt. Mr. Bush is not trying to make a "fresh start", but is simply seeking to shake free of substantial unsecured debt that he incurred in order to maintain a standard of living he could not afford during the period of time he was operating the business Design Energy Systems, Inc. This is not an effort to rehabilitate. Under the provisions of § 707(b), I find that the granting of relief in this instance would be a substantial abuse of the provisions of Chapter 7.

Therefore, it is hereby ORDERED that the United States

Trustee's motion to dismiss as to debtor Joella S. Bush is denied;
and further

ORDERED that as to the debtor, John A. Bush, Jr., is
dismissed from this case.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this _____ day of October, 1993.